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NOTES AND COMMENTS

REVIEWABILITY OF NEGATIVE ADMINISTRATIVE ORDERS UNDER THE ROCHESTER TELEPHONE CASE

The Apex Paper Company, let us assume, believes that the Northwestern Railroad is charging it too high a transportation rate and asks the Interstate Commerce Commission to lower the charge. Assume further an unbelievable situation—the Apex has plenty of evidence, the Northwestern has none, and nonetheless the Commission refuses to take action. A “negative order” has resulted, and the Apex wishes a federal court to set it aside. With the question of whether court action can be taken this note deals, covering the beginning of the doctrine of non-reviewability of negative orders in connection with the Interstate Commerce Commission, its spread to other commissions, and its recent demise at the hands of the Supreme Court.

The ill-fated Commerce Court was given jurisdiction by Congress (1) over all cases for the enforcement of any order of the Interstate Commerce Commission other than for the payment of money, and (2) over all cases brought to enjoin, set aside, annul, or suspend any order of the Commission.¹ That was the total extent of that court’s reviewing powers. When the Urgent Deficiencies Act terminated the existence of the Commerce Court, substantially the same powers were transferred to the federal District Courts, the statute today requiring a three-judge district court with a provision for direct appeal from their decision to the Supreme Court.² But this is not the sole method of review possible. The District Courts also have their general equity powers in suits arising under the Constitution and laws of the United States.³ Relief by mandamus, or by motion under the new federal rules, may be given.⁴ Certiorari is a possibility.⁵ Other remedies are conceivable in unusual situations—as, for instance, where the Commission refuses a railroad an adequate allowance for carrying the mail, in which case the Court of Claims would have jurisdiction.⁶

Problems of review of the Interstate Commerce Commission’s orders

¹ There were two more powers which are not material here: (1) the power to restrain departures from the published tariffs under the Elkins Act, and (2) power to issue writs of mandamus for certain causes. See I. L. Sharfman, *The Interstate Commerce Commission*, I, 64.

² Now 28 U.S.C.A. §§ 41(27), 41(28), 47, as amended by § 345. See also §§ 46, 48; I. L. Sharfman, *The Interstate Commerce Commission*, I, 70, 278.

³ 28 U.S.C.A. § 41 (1). See note 5 to *Shannahan v. United States*, 303 U.S. 596, 58 S. Ct. 732, 82 L. Ed. 1039 at 1043 (1938); *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177, 59 S.Ct. 160, 83 L. Ed. (Adv.) 170 (1938); *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U.S. 56, 59 S. Ct. 409, 83 L. Ed. (Adv.) 402 (1939).

⁴ 28 U.S.C.A. § 377. Mandamus is abolished in name by Rule 81(b) of the Rules of Civil Procedure for the District Courts of the United States.

⁵ 28 U.S.C.A. § 377. It will not, of course, lie to control the discretion of the Commission. *Southern Transportation Co. v. Interstate Commerce Commission*, 61 F. (2d) 925 (1932), cert. den. 289 U.S. 755, 53 S. Ct. 786, 77 L. Ed. 1499 (1933).

⁶ See *United States v. Griffin*, 303 U.S. 226 at 238, 58 S. Ct. 601, 82 L. Ed. 764 at 772 (1938).

are relevant in the case of other Federal commissions (1) because all, of course, encounter the same constitutional limitations, and (2) because frequently Congress sees fit to use the Urgent Deficiencies Act remedy as a method of review of orders of other commissions, among them the Federal Communications Commission⁷ and the Secretary of Agriculture under the Packers and Stockyards Act.⁸

Despite our constitutional separation of powers, the delegation by a legislature to an administrative tribunal of the power to make regulations has been permitted by the use of the time-honored fiction that nothing more is delegated than the administrative function of determining when a law is effective and should go into execution.⁹ On the basis of this, the legislature provides a standard, such as "reasonable," and the administrative board determines whether the facts fit this standard. Of course, the legislature generally intends that the board's findings of fact under these powers shall be final, and the Interstate Commerce Commission is no exception to this generalization. As to reparation awards, Congress has merely made them *prima facie* evidence in suits in court; but as to proceedings to enforce orders other than for the payment of money, the court need only determine that the order was regularly made and duly served, and that the carrier is in disobedience of the order.¹⁰ Furthermore, the entire Interstate Commerce Act has been so construed as to breathe a spirit of uniformity, necessitating control by a single administrative tribunal rather than a multitude of courts.¹¹

Add to this the fact that a constitutional issue presents itself. The Supreme Court and the District Courts of the United States cannot substitute themselves for a commission too far or they will find themselves, judicial bodies, doing quasi-legislative work. Hence a provision for a chancery type of appeal from a commission to the Supreme Court is unconstitutional, though an appeal to such a hybrid legislative-constitutional court as that of the District of Columbia is valid.¹² Because of these statutory and constitutional limitations, the Supreme Court in reviewing the decisions of administrative tribunals, and especially the Interstate Commerce Commission, is aided by three guideposts: (1) the doctrine of administrative finality, (2) the primary jurisdiction doctrine, and (3) the requirement of exhaustion of administrative remedies.

(1) *The Doctrine of Administrative Finality*

The decision of the Interstate Commerce Commission, and of any

⁷ 47 U.S.C.A. § 402(a).

⁸ See *United States v. Corrick*, 298 U.S. 435 at 438, 56 S. Ct. 829, 80 L. Ed. 1263 at 1266 (1936). The Urgent Deficiencies Act remedy was carried over to orders of the Interstate Commerce Commission under the Emergency Railroad Transportation Act of 1933, in 49 U.S.C.A. § 266.

⁹ For one of the first expressions of this theory, see *Wayman v. Southard*, 10 Wheat, 1 at 43, 6 L. Ed. 253 at 263 (1825).

¹⁰ 49 U.S.C.A. § 16.

¹¹ *Robinson v. Baltimore & O. R. Co.*, 222 U.S. 506, 32 S. Ct. 114, 56 L. Ed. 288 (1912).

¹² *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 43 S. Ct. 445, 67 L. Ed. 731 (1923). See W. G. Katz, "Federal Legislative Courts," 43 Harv. L. Rev. 894 (1930).

other commission where the statute manifests such an intent, is conclusive as to any question of fact.¹³ This is subject to the conditions, on which the Commission is subject to judicial review, that the decision must be (1) within its constitutional power¹⁴ and (2) within its statutory authority.¹⁵ Perhaps derived from these two is the further qualification that the action of the Commission must not be arbitrary, on the ground that "the substance, and not the shadow, determines the validity of the exercise of the power;"¹⁶ and as part of this we have the requirement that there must be some proof to sustain the findings of the Commission,¹⁷ though the court will not weigh the evidence itself where there is a conflict.¹⁸

This last proposition, of course, relates only to the validity of the order under the statute and not the Constitution. Where a commission acts in a quasi-legislative capacity, the Supreme Court naturally cannot give its findings any more weight than it would give to the findings of Congress itself; and hence, in determining the constitutionality of an act of a commission, the court will hear all evidence *de novo*, giving no more weight to the hearings of the commission than it would give to the hearings of a legislature.¹⁹ It would seem advisable, in seeking to set aside a rate order of the Interstate Commerce Commission, to include an allegation that the rate takes the property of the railroad without due process of law; without this constitutional question, as has been shown, a shipper is already beaten, since any substantial proof, regardless of the weight of the evidence, will sustain the order under the statute.

Puzzlement sometimes arises over what is a question of law and what is one of fact upon which the Commission's determination can be final. A question of the reasonableness of a rate is fact,²⁰ as is also the question

¹³ *United States v. Louisville & N.R. Co.*, 235 U.S. 314, 35 S. Ct. 113, 59 L. Ed. 245 (1914).

¹⁴ *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 56 S. Ct. 797, 80 L. Ed. 1209 (1936).

¹⁵ *United States v. Idaho*, 298 U.S. 105, 56 S. Ct. 690, 80 L. Ed. 1070 (1936).

¹⁶ *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U.S. 452, 30 S. Ct. 155, 54 L. Ed. 280 (1910).

¹⁷ *Florida East Coast R. Co. v. United States*, 234 U.S. 167, 34 S. Ct. 867, 58 L. Ed. 1267 (1914). See also *Interstate Commerce Commission v. Louisville & N.R. Co.*, 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431 (1913).

¹⁸ *Chicago, I. & L. R. Co. v. United States*, 270 U.S. 287, 46 S. Ct. 226, 70 L. Ed. 590 (1926).

¹⁹ *Baltimore & O.R. Co. v. United States*, 298 U.S. 394, 56 S. Ct. 797, 80 L. Ed. 1209 (1936); *St. Joseph Stockyards v. United States*, 298 U.S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1936); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 40 S. Ct. 527, 64 L. Ed. 908 (1920). As a matter of fact, however, the above cases show that more weight is given formal hearings of a commission, because of their careful investigation, than is given the legislature.

²⁰ *Interstate Commerce Commission v. Chicago R.I. & P.R. Co.*, 218 U.S. 88, 30 S. Ct. 651, 54 L. Ed. 946 (1910); *Virginian R. Co. v. United States*, 272 U.S. 658, 47 S. Ct. 222, 71 L. Ed. 463 (1926). See also *Western Paper Makers' Chemical Co. v. United States*, 271 U.S. 268, 46 S. Ct. 500, 70 L. Ed. 941 (1926); *Interstate Commerce Commission v. Union P. R. Co.*, 222 U.S. 541, 32 S. Ct. 108, 56 L. Ed. 308 (1912); *Chicago, R.I. & P.R. Co. v. United States*, 274 U.S. 29, 47 S. Ct. 486, 71 L. Ed. 911 (1927).

of whether a reduced rate is justified.²¹ Similarly, a decision as to whether a rate is unjustly discriminatory against shippers or localities,²² or whether an intrastate rate discriminates unjustly against interstate rates in the matter of revenue,²³ is conclusive on the courts. A factual question as to discrimination is presented where one railroad refuses to make arrangements for reciprocal shipping with another.²⁴ Where a railroad grants to one locality the privilege of letting goods off at an intermediate point and reshipping them later, refusing the privilege to another community, a determination as to undue preference is factual.²⁵ The "long and short haul clause," requiring the same proportionate charge for a long haul as a short one and allowing the Commission to make an exception where the circumstances are substantially dissimilar, creates a question of fact as to the similarity of the circumstances.²⁶ A decision as to whether the public necessity requires the issuance of a certificate of convenience and necessity to a carrier is one of fact.²⁷ Whether a carrier's receiving goods from industries on a spur track rather than at its usual terminals is merely a substituted service or an additional service for which an extra charge may be made is a question for the Commission.²⁸ In counting the number of cars allotted to a coal mine in times of car shortage, whether shippers' private cars and cars carrying fuel for the railroads' own use should be counted is a matter for administrative discretion.²⁹ A decision as to what is a fair share of a joint rate between two railroads is for the Commission.³⁰

On such orders, the requisite findings of fact are essential to the validity of the Commission's order,³¹ and the court will not analyze the

²¹ *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431 (1913); *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 54 S. Ct. 692, 78 L. Ed. 1260 (1934).

²² *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U.S. 235, 31 S. Ct. 392, 55 L. Ed. 448 (1911); *Seaboard Air Line R. Co. v. United States*, 254 U.S. 57, 41 S. Ct. 24, 65 L. Ed. 129 (1920); *United States v. Illinois C. R. Co.*, 263 U.S. 515, 44 S. Ct. 189, 68 L. Ed. 417 (1924). However, whether the term "localities" includes ocean ports which will reship the goods is a matter of statutory construction. *Texas & P. R. Co. v. United States*, 289 U.S. 627, 53 S. Ct. 768, 77 L. Ed. 1410 (1933).

²³ *Florida v. United States*, 292 U.S. 1, 54 S. Ct. 603, 78 L. Ed. 1077 (1934).

²⁴ *Chicago, I. & L. R. Co. v. United States*, 270 U.S. 287, 46 S. Ct. 226, 70 L. Ed. 590 (1926).

²⁵ *United States v. Louisville & N. R. Co.*, 235 U.S. 314, 35 S. Ct. 113, 59 L. Ed. 245 (1914).

²⁶ *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U.S. 184, 16 S. Ct. 700, 40 L. Ed. 935 (1896).

²⁷ *Claiborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 52 S. Ct. 440, 76 L. Ed. 808 (1932).

²⁸ *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 234 U.S. 294, 34 S. Ct. 814, 58 L. Ed. 1319 (1914).

²⁹ *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U.S. 452, 30 S. Ct. 155, 54 L. Ed. 280 (1910).

³⁰ *Akron, C. & Y. R. Co. v. United States*, 261 U.S. 184, 43 S. Ct. 270, 67 L. Ed. 605 (1923).

³¹ *United States v. Baltimore & O. R. Co.*, 293 U.S. 454, 55 S. Ct. 268, 79 L. Ed. 587 (1935).

facts independently even to sustain the order.³² But if from the record there appears some legal ground which the Commission had neglected, the court may consider that—if, for instance, an agreement which the Commission had erroneously considered unjustly discriminatory was illegal as a pool.³³

In the case of reparation awards, which are analogous to judgments for damages incurred, it would seem possible to make them conclusive even on constitutional grounds. Here the Commission is not acting as a legislature, whose acts the court must view from afar and test anew as to constitutionality; rather it is acting as a trial court, whose judgment should be final if supported by substantial evidence. But the framers of the statute evinced a different intent in the "prima facie" clause;³⁴ and hence it has been held that suit in court after the award is still a suit on the injury and not on the award, the award being mere evidence in the cause.³⁵ However, recently the courts have given conclusive effect even to reparation awards,³⁶ probably on the ground that a shipper electing to sue before the Interstate Commerce Commission rather than a court is bound by his election.³⁷

Returning again to the quasi-legislative orders of the Commission, the reviewable questions of law sometimes look deceptively like matters of fact. Whether conditions are substantially dissimilar, so as to justify charging a different rate for the transportation of coal to be used as fuel for the railroad itself, is a question of law going to the power of the Commission.³⁸ Though, as before mentioned, the question of the existence of unjust discrimination is one of fact, the question of which railroad is to blame for the discrimination is one of law.³⁹ Though a construction of a tariff involving complex details of the trade is one for an administrative bureau, a construction where all the court need do is read the English language and apply its obvious meaning is a question of law.⁴⁰ Where a statute provides that the Commission shall have no jurisdiction to order abandonment of spur tracks, its decision that a

³² *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.*, 186 U.S. 320, 22 S. Ct. 824, 46 L. Ed. 1182 (1902).

³³ *Southern P. Co. v. Interstate Commerce Commission*, 200 U.S. 536, 26 S. Ct. 330, 50 L. Ed. 585 (1906).

³⁴ 49 U.S.C.A. § 16.

³⁵ *Lewis-Simas-Jones Co. v. Southern P. Co.*, 283 U.S. 654, 51 S. Ct. 592, 75 L. Ed. 1333 (1931); *Pennsylvania R. Co. v. Weber*, 257 U.S. 85, 42 S. Ct. 18, 66 L. Ed. 141 (1921); *Mills v. Lehigh Valley R. Co.*, 238 U.S. 473, 35 S. Ct. 888, 59 L. Ed. 1414 (1915); *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 35 S. Ct. 328, 59 L. Ed. 644 (1915).

³⁶ *Adams v. Mills*, 286 U.S. 397, 52 S. Ct. 589, 76 L. Ed. 1184 (1932).

³⁷ *Baltimore & O. R. Co. v. Brady*, 288 U.S. 448, 53 S. Ct. 441, 77 L. Ed. 888 (1933).

³⁸ *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 225 U.S. 326, 32 S. Ct. 742, 56 L. Ed. 1107 (1912)). See also *Interstate Commerce Commission v. Northern P. R. Co.*, 216 U.S. 538, 30 S. Ct. 417, 54 L. Ed. 608 (1910).

³⁹ *Central Railroad Co. of New Jersey v. United States*, 257 U.S. 247, 42 S. Ct. 80, 66 L. Ed. 217 (1921).

⁴⁰ *Brown & Sons Lumber Co. v. Louisville & N. R. Co.*, 299 U.S. 393, 57 S. Ct. 265, 81 L. Ed. 301 (1937).

track is not a spur track is obviously not conclusive on the court.⁴¹ A type of reviewable arbitrary action, in addition to that where no evidence exists to support the order, appears when the Commission denies a rehearing and issues an order based on pre-depression figures.⁴²

(2) *The Primary Jurisdiction Doctrine*

When a statute manifests an intention to make a board's decisions final, as most statutes creating administrative tribunals do, and shows an intention to center all the control in that one board in the interests of uniformity of decision, naturally that board's conclusions will be final, subject to the qualifications above. And naturally, since that board is the ultimate arbiter as to questions of fact, the courts will require that all questions of fact be submitted to the board before any protests may be brought into court.⁴³ That requirement has been termed the primary jurisdiction doctrine.⁴⁴

It is because of this that, where the court informs the Commission that it has made a mistake as to the law, it will remand the case to the Commission rather than determine if there is any foundation for the order under the newly-applied legal principles.⁴⁵ Throughout the entire doctrine, exactly the same tests will be used as apply to the doctrine of administrative finality, because the two principles are grounded in the same reasons: (1) the general intent of the statute that determinations of fact be uniform and hence fixed by the same body, and (2) the Supreme Court's abhorrence of suddenly finding itself unconstitutionally doing quasi-legislative work.

Hence we find that the "similar circumstances" test of the long-short haul clause is also a matter for primary jurisdiction,⁴⁶ as are all other matters of fact—whether a classification excluding silk from freight rates is reasonable;⁴⁷ whether a rate is unjustly discriminatory;⁴⁸

⁴¹ *United States v. Idaho*, 298 U.S. 105, 56 S. Ct. 690, 80 L. Ed. 1070 (1936). See also *United States v. Baltimore & O.S.W.R. Co.*, 226 U.S. 14, 33 S. Ct. 5, 57 L. Ed. 104 (1912).

⁴² *Atchison, T. & S. F. R. Co. v. United States*, 284 U. S. 248, 52 S. Ct. 146, 76 L. Ed. 273 (1932).

⁴³ *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907). See note, 51 Harv. L. Rev. 1251.

⁴⁴ *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 59 S. Ct. 768, 83 L. Ed. (Adv.) 718 (1939).

⁴⁵ *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U.S. 197, 16 S. Ct. 666, 40 L. Ed. 940 (1896); *Louisville & N. R. Co. v. Behlmer*, 175 U.S. 648, 20 S. Ct. 209, 44 L. Ed. 309 (1900); *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U.S. 1, 21 S. Ct. 516, 45 L. Ed. 719 (1901).

⁴⁶ *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U.S. 197, 16 S. Ct. 666, 40 L. Ed. 940 (1896); *Louisville & N. R. Co. v. Behlmer*, 175 U.S. 648, 20 S. Ct. 209, 44 L. Ed. 309 (1909).

⁴⁷ *Director General of Railroads v. Viscose Co.*, 254 U.S. 498, 41 S. Ct. 151, 65 L. Ed. 372 (1921).

⁴⁸ *Robinson v. Baltimore & O. R. Co.*, 222 U.S. 506, 32 S. Ct. 114, 56 L. Ed. 288 (1912); *Railroad Comrs. v. Great Northern R. Co.*, 281 U.S. 412, 50 S. Ct. 391, 74 L. Ed. 936 (1930).

whether a refusal to furnish cars for shipment into another country is an unjust discrimination against a shipper;⁴⁹ whether a continuance of a spur track is discriminatory;⁵⁰ whether rules of car distribution in times of shortage are discriminatory;⁵¹ whether there has been an unjust discrimination such as to justify a criminal prosecution under the Commerce Act;⁵² whether a rate is reasonable;⁵³ whether a railroad is justified in carrying goods around a longer and more expensive route;⁵⁴ and whether a tariff concerning "lumber" rates would in the technical trade usage include oak cross-ties.⁵⁵ A railroad complaining of the valuation of its property on which a fair return must be calculated must go to the Commission first.⁵⁶ Where there is a question of fact as to whether a rebate has been allowed, as where the railroad asserts that the money was given for hauling services, primary resort to the Commission is required; but where the rebate is obvious, as where the pseudo-haulers have no locomotives, it is a question of law which the court may consider originally.⁵⁷

Where a general order of the Commission is attacked only on the grounds that it is beyond the statutory or constitutional authority of the Commission, there is, of course, no need for primary resort to the administrative board.⁵⁸ All questions of statutory and constitutional construction inevitably affect the power of the Commission. And obvious questions of fact are assimilated to questions of law—as where a tariff filed with the Commission charged extra for reconsignments, making an exception as to grain stopped for inspection purposes, and the grain was clearly stopped for inspection purposes.⁵⁹ Similarly, where there is no

⁴⁹ *St. Louis, B. & M. R. Co. v. Brownsville Nav. Dist.*, 304 U.S. 295, 58 S. Ct. 868, 82 L. Ed. 1357 (1938).

⁵⁰ *Western & A. R. Co. v. Georgia Public Serv. Com.*, 267 U.S. 493, 45 S. Ct. 409, 69 L. Ed. 753 (1925).

⁵¹ *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U.S. 304, 33 S. Ct. 938, 57 L. Ed. 1494 (1913); *Midland Valley R. Co. v. Barkley*, 276 U.S. 482, 48 S. Ct. 342, 72 L. Ed. 664 (1928).

⁵² *United States v. Pacific & A. R. & N. Co.*, 228 U.S. 87, 33 S. Ct. 443, 57 L. Ed. 742 (1913).

⁵³ *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907); *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U.S. 1, 21 S. Ct. 516, 45 L. Ed. 719 (1901).

⁵⁴ *Northern P. R. Co. v. Solum*, 247 U.S. 477, 38 S. Ct. 550, 62 L. Ed. 1221 (1918).

⁵⁵ *Texas & P. R. Co. v. American Tie & Timber Co.*, 234 U.S. 138, 34 S. Ct. 885, 58 L. Ed. 1255 (1914).

⁵⁶ *Dayton-Goose Creek R. Co. v. United States*, 263 U.S. 456, 44 S. Ct. 169, 68 L. Ed. 388 (1924).

⁵⁷ *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 230 U.S. 247, 33 S. Ct. 916, 57 L. Ed. 1472 (1913). See also *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U.S. 184, 33 S. Ct. 893, 57 L. Ed. 1446 (1913).

⁵⁸ *Turner, D. & L. Lumber Co. v. Chicago, M. & St. P. R. Co.*, 271 U.S. 259, 46 S. Ct. 530, 70 L. Ed. 934 (1926); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 39 S. Ct. 375, 63 L. Ed. 772 (1919).

⁵⁹ *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922).

car shortage, a shipper need not go to the Commission before suing for refusal to furnish cars.⁶⁰ An outright question of unconstitutionality of a statute obviously may be presented to the court in the first instance.⁶¹

(3) *The Exhaustion of Administrative Remedies*

As the second principle grew out of the first, so the third grows out of the second and is a part of it. Originally developed where there was a right of appeal from the first administrative decision to a higher administrative body, the principle required that resort be had to this appeal before the courts would take jurisdiction.⁶² This would be applied even though the Commission has manifested a hostile attitude.⁶³ In the case of the Interstate Commerce Commission, the requirement has not fared very well. It was of course held that where the Commission makes an order without hearing, the hearing being provided for before the order went into effect, the complaining party must apply for a hearing before he can go into court to have the order enjoined.⁶⁴ But although a request for a rehearing before the entire Commission would be in order, since it is in effect an appeal to a superior administrative tribunal, the question of dismissing the suit has been left to the discretion of the trial court, inasmuch as the filing of an application for rehearing does not stay the order.⁶⁵ Of course, the doctrine does not require a mere petition for rehearing which is only that and not in effect an appeal.⁶⁶ And where the assertion is that a rate now in effect is confiscatory and hence deprives the complainant of property without due process of law, the courts will take jurisdiction immediately, since every minute the rate continues it takes property from the utility.⁶⁷ There is no constitutional objection to thus treating this doctrine as a mere rule of convenience; obviously the court merely passes upon constitutional, and occasionally statutory, questions, and does not substitute its discretion for the Commission's, even though it takes action before the administrative board has concluded its action.

In the past, however, these three principles have not seemed to be adequate to the difficult job of reconciling court and Commission, and

⁶⁰ *Pennsylvania R. Co. v. Sonman S. C. Co.*, 242 U.S. 120, 37 S. Ct. 46, 61 L. Ed. 188 (1916).

⁶¹ *Louisville & N. R. Co. v. F. W. Cook Brewing Co.*, 223 U.S. 70, 32 S. Ct. 189, 56 L. Ed. 355 (1912).

⁶² *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 29 S. Ct. 67, 53 L. Ed. 150 (1908). See notes, 27 Col. L. Rev. 450; 35 Col. L. Rev. 230.

⁶³ *Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159, 49 S. Ct. 282, 73 L. Ed. 562 (1929).

⁶⁴ *United States v. Illinois C. R. Co.*, 291 U.S. 457, 54 S. Ct. 471, 78 L. Ed. 909 (1934).

⁶⁵ *United States v. Abilene & S. R. Co.*, 265 U.S. 274, 44 S. Ct. 565, 68 L. Ed. 1016 (1924).

⁶⁶ *Prendergast v. New York Telephone Co.*, 262 U.S. 43, 43 S. Ct. 466, 67 L. Ed. 853 (1923).

⁶⁷ *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290, 43 S. Ct. 353, 67 L. Ed. 659 (1923); *Pacific Telephone & Telegraph Co. v. Kuykendall*, 265 U.S. 196, 44 S. Ct. 553, 68 L. Ed. 975 (1924).

it has been deemed necessary to consider the type of order. Orders may be classified into four main types: (1) Refusals to take jurisdiction, (2) nonfinal orders, (3) permissive orders, and (4) the so-called "negative orders."

(1) *Refusals to Take Jurisdiction*

It is clear that such a refusal is an error of law, and mandamus—or an appropriate motion under the new federal rules—will lie to compel the Commission to exercise its jurisdiction, even though it cannot control the conclusion to which the Commission's discretion will lead.⁶⁸ Thus if the Commission dismisses a hearing concerning an Alaskan carrier on the ground that it has jurisdiction only over states and territories and Alaska is not a territory, the Supreme Court, in holding Alaska to be such a territory, will allow mandamus to issue.⁶⁹ Similarly, if the Commission decides that a statute of limitations has deprived it of jurisdiction, and the court decides contrariwise, it will mandamus the Commission.⁷⁰ Where a statute directs the Commission to evaluate the property of carriers, considering both original cost and cost of reproduction, and the Commission declines on the ground that it is impossible to arrive at a figure that is anything but fanciful, the court will enforce the express mandate of the statute.⁷¹ However, mandamus will not issue unless the administrative tribunal was clearly wrong in refusing to take jurisdiction, and if the administrative interpretation of the statute looks fairly logical, the court will accept it and refuse to issue mandamus.⁷² Furthermore, it was held in *Interstate Commerce Commission v. United States ex rel. Campbell*⁷³ that mandamus is not available where the Commission has actually taken jurisdiction and has merely made an error of law. The case arose from a reparation proceeding before the Commission, in which the Commission ruled that there had been undue preferences, but that no damages had resulted. While scorning the proposition that damages must as a matter of law result to petitioner merely because some one else is benefited, the court assumed the proposition to be true and held that it nonetheless made no difference. And of course the writ will not lie to control the administrative discretion as to matters of fact.⁷⁴

⁶⁸ *Interstate Commerce Commission v. United States ex rel. Humboldt S. S. Co.*, 224 U.S. 474, 32 S. Ct. 556, 56 L. Ed. 849 (1912); *United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission*, 246 U.S. 638, 38 S. Ct. 408, 62 L. Ed. 914 (1918).

⁶⁹ *Interstate Commerce Commission v. United States ex rel. Humboldt S. S. Co.*, 224 U.S. 474, 32 S. Ct. 556, 56 L. Ed. 849 (1912).

⁷⁰ *United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission*, 246 U.S. 638, 38 S. Ct. 408, 62 L. Ed. 914 (1918).

⁷¹ *United States ex rel. Kansas City Southern Railway Co. v. Interstate Commerce Commission*, 252 U.S. 178, 40 S. Ct. 187, 64 L. Ed. 517 (1920).

⁷² *United States ex. rel. Chicago G. W. R. Co. v. Interstate Commerce Commission*, 294 U.S. 50, 55 S. Ct. 326, 79 L. Ed. 752 (1935).

⁷³ 289 U.S. 385, 53 S. Ct. 607, 77 L. Ed. 1273 (1933).

⁷⁴ *Southern Transportation Co. v. Interstate Commerce Commission*, 61 F. (2d) 925 (1932), cert. den. 289 U.S. 755, 53 S. Ct. 786, 77 L. Ed. 1499 (1933).

(2) *Nonfinal Orders*

Here we (1) run into a tangle as to what Congress meant in the statute, usually by providing for review of "orders," and (2) find ourselves in the shadow of the Constitution. Article 3, Section 2, granting jurisdiction to the federal courts in certain "cases" and "controversies," has been construed to grant nothing but the power to hear such cases and controversies.⁷⁵ A case has been defined as a suit instituted according to the regular course of judicial procedure, while a controversy includes only suits of a civil nature,⁷⁶ which helps us not very much. The courts, regarding finality of orders as one test of the judicial function, have used the section to strike down a statute giving them a function which was purely advisory to the Secretary of the Treasury, holding that a mere administrative question.⁷⁷ But aside from this, it would seem, and it has been suggested, that the implied restriction should merely be a device to aid the courts in deciding when a justiciable issue exists—one in which the court's opinion will have a practical effect instead of merely shaping nothingness into logic. To fill this requisite, it has been submitted that (1) the party seeking action by the court should have a practical, concrete interest and (2) the defendant's acts must be sufficiently definite to constitute a genuine threat or prejudice to the plaintiff's interests.⁷⁸ On this theory, a nonfinal order which actually did nothing but make a shipper or carrier worry that something would happen to him when further steps were taken would present no question that a court should decide; but, as will be seen, a commission's threat to publish a company's financial data could present such a justiciable issue.

As to the matter of statutory construction, it was at first held that the double-barrelled aspect of the Urgent Deficiencies Act, providing for (1) enforcement and (2) enjoining of orders, required that only those orders be enjoinable which were enforceable,⁷⁹ but this view has since been rejected.⁸⁰ Today the principle seems to be that the courts will not enjoin a mere order or report in the course of a proceeding unless it works an unreasonable hardship.

Thus where the Valuation Act required the Interstate Commerce Commission to make valuations of the property of carriers as a basis for

⁷⁵ *United States v. Ferreira*, 13 How. 40, 14 L. Ed. 42 (1851).

⁷⁶ *Muskrat v. United States*, 219 U.S. 346, 31 S. Ct. 250, 55 L. Ed. 246 (1911).

⁷⁷ *United States v. Ferreira*, 13 How. 40, 14 L. Ed. 42 (1851). See also *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047 (1894), holding that a proceeding in court by the Interstate Commerce Commission to compel production of papers is a case. This seems sound. Regardless of the fact that the papers are wanted merely in the course of another proceeding, the defendant and the plaintiff are fighting over a possible direct loss or gain—the possession of the papers.

⁷⁸ Edwin Borchard, "Justiciability," 4 U. of Chi. L. Rev. 1.

⁷⁹ *United States v. Illinois C. R. Co.*, 244 U.S. 82, 37 S. Ct. 584, 61 L. Ed. 1007 (1917).

⁸⁰ *Baltimore & O. R. Co. v. United States (Chicago Junction Case)*, 264 U.S. 258, 44 S. Ct. 317, 68 L. Ed. 667 (1924).

rate-setting, neither a tentative⁸¹ nor a final⁸² valuation is reviewable—the carriers must wait until a rate is sought to be enforced. A mere report of the Commission, in which it found that the balance sheet of a company should not record an investment of above nine million, but did not enter any order to that effect, has been held not reviewable.⁸³ General equity powers here do not provide a remedy, because the Commission's "conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction."⁸⁴

A notice to attend a hearing before the Commission will not be enjoined, even though it will involve expense to the carrier.⁸⁵ Here the court is probably influenced by the realization of how such injunctions would hamper administrative procedure, but reinforces its decision upon the ground that if the notice is without authority the carrier may disobey it without fear.

The decisions of the Federal Power Commission, though it is not under the Urgent Deficiencies Act, are reviewed under a statute providing for review of any "order."⁸⁶ This provision, in *Federal Power Commission v. Metropolitan Edison Company*,⁸⁷ was treated as analogous to the Urgent Deficiencies Act, meaning a final order and not a procedural step, and the court refused to enjoin a notice to appear for a rehearing.

However, as before pointed out, the general equity powers may fill the gap when the Urgent Deficiencies Act fails. Where a statute compelled all but interurban carriers to go before the National Mediation Board in labor disputes, and the Board was empowered to ask the Interstate Commerce Commission for a determination as to whether the carrier was interurban, such a determination was held nonreviewable under the statutory remedy as a mere finding and not an order.⁸⁸ But the fact that refusal to go before the Board would then subject the carrier to criminal prosecution for violating the act was later held to justify exercise of the general equity powers.⁸⁹ However, our old friend, the doctrine of administrative finality, entered in; and since the Commission had had

⁸¹ *Delaware & Hudson Co. v. United States*, 266 U.S. 438, 45 S. Ct. 153, 69 L. Ed. 369 (1925).

⁸² *United States v. Los Angeles & Salt Lake R. R. Co.*, 273 U.S. 299, 47 S. Ct. 413, 71 L. Ed. 651 (1927).

⁸³ *United States v. Atlanta B. & C. R. Co.*, 282 U.S. 522, 51 S. Ct. 237, 75 L. Ed. 513 (1931).

⁸⁴ *United States v. Los Angeles & Salt Lake R. R. Co.*, 273 U.S. 299 at 314, 47 S. Ct. 413, 71 L. Ed. 651 at 657 (1927).

⁸⁵ *United States v. Illinois C. R. Co.*, 244 U.S. 82, 37 S. Ct. 584, 61 L. Ed. 1007 (1917).

⁸⁶ 16 U.S.C.A. § 825(1).

⁸⁷ 304 U.S. 375, 58 S. Ct. 963, 82 L. Ed. 1408 (1938).

⁸⁸ *Shannahan v. United States*, 303 U.S. 596, 58 S. Ct. 732, 82 L. Ed. 1039 (1938).

⁸⁹ *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177, 59 S. Ct. 160, 83 L. Ed. (Adv.) 170 (1938). See also *Powell v. United States*, 300 U.S. 276, 57 S. Ct. 470, 81 L. Ed. 643 (1937).

enough evidence before it to justify the order, it was sustained on the merits. The general equity powers were also held to justify taking jurisdiction to enjoin the publication of data by the National Bituminous Coal Commission, though it was not an order and not reviewable as such.⁹⁰

(3) *Permissive Orders*

Permissive orders need not detain us long. They arise where a commission gives someone authority to do something which he would otherwise be forbidden to do, either by granting a certificate of convenience and necessity,⁹¹ or by an order finding the action allowable.⁹² They are invariably reviewable, despite the fact that they would be impossible to enforce.⁹³ It is when a permissive order is *refused* that we run into one type of negative order, and meet our greatest problem.

(4) *Negative Orders*

The term "negative order" is used to indicate a refusal on the part of a commission to act, rather than an order prohibiting action. In the past, the court has refused to take jurisdiction of any review of such orders, for two reasons; (a) the theory, previously mentioned as repudiated, that the Urgent Deficiencies Act gave jurisdiction to enjoin only what could be enforced,⁹⁴ and (b) the fear, resulting from a confusion with the doctrine of administrative finality, that the court might find itself doing administrative and quasi-legislative work.⁹⁵

The National Association of Railroad Commissioners adopted rules governing demurrage charges, which the Interstate Commerce Commission approved but did not make mandatory. The Proctor and Gamble Company, which owned five hundred cars of its own, complained to the Commission that these rules made them pay charges on their own cars, thus being discriminatory. The Commission denied relief, and the company sued in the Commerce Court to set aside the order. In *Proctor and Gamble Company v. United States*,⁹⁶ the doctrine of nonreviewability of negative orders was launched by the court's holding that this refusal of relief against the third person carriers was not reviewable under what later became the Urgent Deficiencies Act. It has been suggested, however, that the case really denied relief because there was

⁹⁰ *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U.S. 56, 59, S. Ct. 409, 83 L. Ed. (Adv.) 402 (1939).

⁹¹ *Colorado v. United States*, 271 U.S. 153, 46 S. Ct. 452, 70 L. Ed. 878 (1926).

⁹² *Baltimore & O. R. Co. v. United States (Chicago Junction Case)*, 264 U.S. 258, 44 S. Ct. 317, 68 L. Ed. 667 (1924).

⁹³ See notes 91 and 92, *supra*.

⁹⁴ See *Procter & Gamble Co. v. United States*, 225 U.S. 282, 32 S. Ct. 761, 56 L. Ed. 1091 (1912). Denials of relief are specifically reviewable by statute in the case of the National Labor Relations Board, 29 U.S.C.A. § 160(f), and as to the Interstate Commerce Commission under the Civil Aeronautics Act, 49 U.S.C.A. § 646(a).

⁹⁵ See *Manufacturers R. Co. v. United States*, 246 U.S. 457, 38 S. Ct. 383, 62 L. Ed. 831 (1918).

⁹⁶ 225 U.S. 282, 32 S. Ct. 761, 56 L. Ed. 1091 (1912).

evidence to support the Commission's findings, and hence it need not have been taken as the cornerstone of the negative order doctrine.⁹⁷

Types of negative orders which then flowered may be split into three groups; (a) those which decline to relieve from a statutory command or prohibition, (b) those which decline relief against a third person, and (c) really a part of the second group, those which decline to modify a continuing order of the Commission.

The refusal to relieve from a statutory prohibition arose under the Panama Canal Act, which prohibited any railroad from owning any common carrier by water with which it might compete and authorized the Interstate Commerce Commission to determine the fact of possible competition. The Commission decided adversely to the railroad, and the court refused to hear the question, even though assuming *arguendo* that it was a question of law.⁹⁸ However, it seems clear that this was a question of fact and that the doctrine of administrative finality would have reached the same result.

A situation only apparently similar arises where a statute prohibits carriers from extending their lines without a certificate of convenience and necessity, but expressly exempts interurban lines from the jurisdiction of the Commission. The Commission of course would have to deny a certificate if it had no jurisdiction; and a denial of the certificate on the merits, over the carrier's contention that it is an interurban line, is not reviewable in court, since in effect it merely seeks a declaratory judgment from the courts that the statute is not applicable to it.⁹⁹ Of course, if the carrier then starts building the extension and the Commission sues to enjoin it, there is then a quarrel of which the courts will take cognizance.¹⁰⁰ There seems to be no reason why the overruling of the negative order doctrine would affect this situation.

As examples of those negative orders which decline relief against a third person, we have refusals of the Commission to grant reparations to a shipper.¹⁰¹ However, the refusal goes also upon the independent grounds of administrative finality and the election of the shipper to proceed before the Commission, which was held to have bound him. *Manufacturers Railway Company v. United States*¹⁰² is another example. The Railway was a terminal line within the city of St. Louis. The trunk lines into that city had applied their St. Louis rates to shippers

⁹⁷ E. Watkins, "Has a Shipper Who Has Been Denied Relief by the Interstate Commerce Commission Any Remedy?" 17 Col. L. Rev. 34. See also E. Watkins, *Shippers and Carriers*, 552; note, 34 Col. L. Rev. 908.

⁹⁸ *Lehigh Valley Railroad Co. v. United States*, 243 U.S. 412, 37 S. Ct. 397, 61 L. Ed. 819 (1917).

⁹⁹ *Piedmont & Northern R. Co. v. United States*, 280 U.S. 469, 50 S. Ct. 192, 74 L. Ed. 551 (1930).

¹⁰⁰ *Piedmont & Northern R. Co. v. Interstate Commerce Commission*, 286 U.S. 299, 52 S. Ct. 541, 76 L. Ed. 1115 (1932).

¹⁰¹ *Standard Oil Co. v. United States*, 283 U.S. 235, 51 S. Ct. 429, 75 L. Ed. 999 (1931). Of course the Procter and Gamble case, already mentioned, is another example.

¹⁰² 246 U.S. 457, 38 S. Ct. 383, 62 L. Ed. 831 (1918).

served either by the Railway or by the Terminal Railroad Association, another terminal line which the trunk lines owned. The trunk lines then absorbed the charges of these terminal lines, paying them their compensation; however, they later regretted their generosity and stopped doing so in the case of the Railway, but continued the absorption in the case of their subsidiary, the Terminal, which admittedly served more people and controlled all the big terminal facilities. Since the Railway's shippers now had to pay the St. Louis rate plus the charge of the Railway, that carrier filed a complaint with the Commission. Originally the Commission held that there was discrimination, and, although it made no order, the trunk lines jumped back to the old arrangement. Later the finding of discrimination was reversed. It was held that the old arrangement had been mere compensation to the Railway and not a division of a joint rate; and since the St. Louis rates were not unreasonable, all the Commission could do was establish a new through route and joint rate. Accordingly it ordered the trunk lines and the Railway to create a through rate, charging not more than the old St. Louis rate plus \$2.50; and it expressed the opinion that the Railway's share should not be more than \$2.50, but it expressly made no order to that effect, instead leaving it to mutual agreement, with a provision that an order could be requested if the parties failed to agree.

The Railway sued to set aside the order, but the court refused to do so. The finding that there was no discrimination was taken as final; and the court pierced through to the fact that really the Railway was complaining of what the order did not do—that it didn't care what the through rate was, if only the Commission had ordered a division to the Railway. Hence, because the Commission's refusal to act was negative, the court refused to set it aside. It is clear, that, in view of the fact that the Commission had provided that it would issue an order in the event of a failure to agree, the primary jurisdiction doctrine would have required exactly the same result.

Those cases which deny relief against a third person and against a continuing order of the Commission are exemplified in refusals of the Commission to reduce rates which have been previously set,¹⁰³ including a refusal to reduce the rate quite as much as the shipper wanted.¹⁰⁴ This has been applied to a refusal of the Secretary of Agriculture to receive a higher rate schedule.¹⁰⁵ It is clear that the same result would generally be reached by the application of the doctrine of administrative finality as to the factual question of reasonableness or discrimination.

Where a nonreviewable negative order existed, it has been indicated that general equity relief is not possible, though the ground is vague;¹⁰⁶

¹⁰³ *United States v. Griffin*, 303 U.S. 226, 58 S. Ct. 601, 82 L. Ed. 764 (1938).

¹⁰⁴ *Hooker v. Knapp*, 225 U.S. 302, 32 S. Ct. 769, 56 L. Ed. 1099 (1912).

¹⁰⁵ *United States v. Corrick*, 298 U.S. 435, 56 S. Ct. 829, 80 L. Ed. 1263 (1936).

¹⁰⁶ *Southern Transportation Co. v. Interstate Commerce Commission*, 47 F. (2d) 411 (1931), cert. den. 283 U.S. 850, 51 S. Ct. 559, 75 L. Ed. 1458 (1931).

and certiorari to the Commission has been denied on the ground that this would be controlling the discretion of the Commission, which cannot be done in this type of proceeding.¹⁰⁷

In several situations, the court has avoided the negative order restriction by saying that the order, though negative in form, was affirmative in substance and hence reviewable. Thus a refusal to allow a carrier to make an exception to the long-short haul clause in effect puts that statute into operation and is affirmative.¹⁰⁸ Where in a proceeding before the Commission to set aside a rule of car distribution, which had been voluntarily continued by the carriers, the Commission refuses to set the rule aside, such action is affirmative, in effect continuing the rule in operation.¹⁰⁹ Where there has been an agreement between carriers as to a through route and joint rate, and one carrier repudiates the agreement as to the future, a refusal of the Interstate Commerce Commission to order a through route is affirmative.¹¹⁰ A refusal by the Commission of a company's request to be allowed to make a change in its accounting system is an order continuing the present system in effect, and is not negative.¹¹¹

Of course the difficulty inherent in the negative order doctrine, and the reason each one of the last cases is inconsistent with some of the previous cases, lies in the fact that *every* negative order is affirmative in substance in the sense the term is used in the last cases, because "negative" refers to form. If the Commission refuses to allow a person to come within the exception to a statute, it has put the statute into operation; if it refuses to grant relief against a third person, it has entered an affirmative order in favor of that third person; if it refuses to relieve from an existing order of its own, it has re-entered that existing order on its books.

It was probably for these reasons that the first breach in the dike came in the case of the Federal Power Commission. Under the statute providing for review of "any order," the court reviewed a refusal of a permit to merge two companies.¹¹² And close on the heels of this case came *Rochester Telephone Corporation v. United States*.¹¹³

By statute, the Federal Communications Commission had no jurisdiction over a carrier which was engaged in interstate commerce only by

¹⁰⁷ *Southern Transportation Co. v. Interstate Commerce Commission*, 61 F. (2d) 925 (1932), cert. den. 289 U.S. 755, 53 S. Ct. 786, 77 L. Ed. 1499 (1933).

¹⁰⁸ *United States v. Atchison, T. & S. F. R. Co.*, 234 U.S. 476, 34 S. Ct. 986, 58 L. Ed. 1408 (1914). See also *Louisville & N. R. Co. v. United States*, 245 U.S. 463, 38 S. Ct. 141, 62 L. Ed. 400 (1918).

¹⁰⁹ *United States v. New River Co.*, 265 U.S. 533, 44 S. Ct. 610, 68 L. Ed. 1165 (1924). See also *United States v. Louisiana & Pacific R. Co.*, 234 U.S. 1, 34 S. Ct. 741, 58 L. Ed. 1185 (1914).

¹¹⁰ *Alton R. Co. v. United States*, 287 U.S. 229, 53 S. Ct. 124, 77 L. Ed. 275 (1932).

¹¹¹ *Norfolk & W. Ry. Co. v. United States*, 52 F. (2d) 967 (1931), aff'd 287 U.S. 134, 53 S. Ct. 52, 77 L. Ed. 218 (1932).

¹¹² *Federal Power Commission v. Pacific Power & Light Co.*, 307 U.S. 156, 59 S. Ct. 766, 83 L. Ed. (Adv.) 664 (1939).

¹¹³ 307 U.S. 125, 59 S. Ct. 754, 83 L. Ed. (Adv.) 718 (1939).

being connected with another carrier, unless it was controlled by that carrier. The Commission served general orders to file certain data on all companies it believed subject to its jurisdiction, including the Rochester. When no response ensued, the Commission ordered the company to show cause why it should not comply, and the Rochester denied jurisdiction. After hearing, the Commission decided that the Rochester was under control of the connecting carrier and ordered it classified as subject to the Communications Act. A bill was brought under the Urgent Deficiencies Act, which had been made applicable to this Commission.

The classification order parallels those which have here been considered as nonfinal orders; but the court assimilated all nonfinal orders into negative orders for the purpose of definitely overruling the Proctor and Gamble case. Henceforth, negative orders, said the court, are to be controlled by the same principles as are affirmative orders, mentioning the doctrines of primary jurisdiction and administrative finality. The order was, however, sustained on the merits.

The principle which started with the Interstate Commerce Commission was overruled as to that Commission in *United States v. Maher*,¹¹⁴ which held reviewable a refusal of a motor carrier's application for a certificate of convenience and necessity. Again the order was sustained on the merits.

Conclusion

Thus the doctrine of nonreviewability of negative orders disappears. Sired by a confused belief in administrative finality, destroyed by the realization that a negative order too may be reviewable on questions of law, the doctrine no longer exists; no longer, except possibly in the case of a nonfinal order where no real injury exists, need we consider the type of order. As was pointed out in connection with each negative order case, little practical change will result—the basic doctrines of administrative finality, primary jurisdiction, and exhaustion of administrative remedies would probably have reached the same result in each of the negative order cases. But at least now these consistent theories sweep the entire domain of judicial review of administrative action, and may conceivably prevent miscarriage of justice where an application of the negative order theory would have worked harshly.

R. W. BERGSTROM

CIVIL PRACTICE ACT CASES

APPEAL AND ERROR—NOTICE—WHETHER FILING OF NOTICE OF APPEAL IS NECESSARY TO GIVE REVIEWING COURT JURISDICTION.—Plaintiff appealed from an order of the trial court sustaining a plea in abatement. Notice of appeal was filed in the trial court within the time required by statute, but neither the transcript of record nor the abstract, filed in the appellate court within sixty days from the date of filing of notice of

¹¹⁴ 307 U.S. 148, 59 S. Ct. 768, 83 L. Ed. (Adv.) 732 (1939).

appeal in the trial court, contained a notice of appeal. The deficiency was later supplied by leave of court by the filing of an additional record and abstracts after the termination of the sixty-day period. On motion to strike the cause, the motion was sustained. The filing of a notice of appeal is jurisdictional. The original record having contained no notice of appeal and the additional record having been filed after sixty days, the court was without jurisdiction to entertain the appeal.¹

The provision of the Illinois Civil Practice Act providing for the institution of an appeal by notice of appeal has caused much unfortunate and perhaps unnecessary confusion in practice in courts of review in Illinois. It has been held, for example, under Rule 34 of the Supreme Court of Illinois,² prior to a recent amendment of that rule, that notice of appeal must be served upon parties in default in the trial court.³ But another appellate court refused to follow this decision.⁴ The Supreme Court adopted the view of the latter decision.⁵

As previously indicated, this rule of the Supreme Court has been changed to provide expressly for notice to be served only upon those whose interests would be adversely affected by a reversal.⁶ This practice is in accord with the rule in a majority of the states.⁷ But the rule, as amended, has not been as yet construed. Similarly, it has been a matter of debate as to whether the filing of one notice of appeal is all that can be permitted, or whether an appeal so instituted may be abandoned and a second appeal commenced, either within the ninety-day period allowed for the filing of a notice of appeal or under the provision of the statute permitting an appeal within one year. It appears to have been generally held that the filing of a second notice of appeal is a nullity insofar as a second appeal is attempted within ninety days.⁸

Insofar as the appeal under the one-year provision of the statute is concerned, there is much difference of opinion. It appears to have been held⁹ that where a notice of appeal has been filed in the trial court but the appeal is dismissed for lack of an assignment of errors, the appellate court cannot permit the filing of a notice of appeal within

¹ *Francke v. Eadie*, 301 Ill. App. 254, 22 N.E. (2d) 720 (2d Dist., 1939).

² Ill. Rev. Stat. 1937, Ch. 110, § 259.34.

³ *Lewis v. Renfro*, 291 Ill. App. 396, 9 N.E. (2d) 652 (4th Dist., 1937). See, however, note to this case, 16 CHICAGO-KENT REVIEW 52.

⁴ *People ex rel. Wilmette State Bank v. Village of Wilmette*, 294 Ill. App. 362, 13 N.E. (2d) 990 (1st Dist., 1st Div., 1938); noted in 16 CHICAGO-KENT REVIEW 273.

⁵ *Kaminskas v. Cepauskis*, 369 Ill. 566, 17 N.E. (2d) 558 (1938), *aff'g* 293 Ill. App. 273, 12 N.E. (2d) 218 (1st Dist., 1st Div., 1938). See notes, 17 CHICAGO-KENT LAW REVIEW 36 at 59, 175.

⁶ Ill. Rev. Stat. 1939, Ch. 110, § 259.34.

⁷ 4 C.J.S. Appeal and Error § 592; 3 Am. Jur., Appeal and Error, §§ 465, 466.

⁸ *Lanquist v. Grossman*, 282 Ill. App. 181 (1st Dist., 2d Div., 1935); *Corrigan v. Von Schill College of Chiropractic*, 277 Ill. App. 350 (1st Dist., 1st Div., 1934); *Cullinan v. Cullinan*, 285 Ill. App. 272, 1 N.E. (2d) 921 (3d Dist., 1936).

⁹ *People ex rel. Bender v. Davis*, 365 Ill. 389, 6 N.E. (2d) 643 (1937). See note, 25 Ill. B.J. 257.

one year under Section 76 of the Illinois Civil Practice Act.¹⁰ A similar ruling has been made by one of the appellate courts.¹¹

It has been said,¹² however, that this decision overlooks the features of the writ of error preserved in the new remedy for review and that it has overlooked the new rule of construction laid down in Section 4 of the Illinois Civil Practice Act.¹³ Suggestion was made¹⁴ prior to any judicial construction of Section 74 of the Illinois Civil Practice Act,¹⁵ that the writ of error had not been abolished. This opinion, however, does not seem to be general.¹⁶

The scope of the decision in *People ex rel. Bender v. Davis*¹⁷ is not yet clear. One of the appellate courts has held that the court purporting to follow the decision in that case has misconstrued the ruling of the Supreme Court and has enunciated an incorrect rule.¹⁸

The decision in the instant case is another evidence of the confusion which will continue to exist until the Supreme Court has authoritatively determined the construction to be given to the statute concerning notice of appeal. This it may do either by decision or by rule of court. It has been held in numerous cases that the filing of notice of appeal is jurisdictional.¹⁹ The rule obtains in Michigan under the Supreme Court rules.²⁰ The appellate courts have followed this rule in some instances very rigidly.²¹

It is submitted, however, that in the instant case the court overlooked the fact that the precedents cited in support of its conclusion by no means led inexorably to the result achieved, since both of the decisions cited by the court apply to a failure to file notice of appeal in the trial court as required by statute. Assuming notice of appeal to be jurisdictional, jurisdiction attaches to entertain the appeal from the date of filing in the trial court.²² The conclusion in the instant

¹⁰ Ill. Rev. Stat. 1939, Ch. 110, § 200.

¹¹ *Schroeder v. Campbell*, 289 Ill. App. 337, 7 N.E. (2d) 329 (1st Dist., 3d Div., 1937); *Moss v. Federal Life Ins. Co.*, 289 Ill. App. 379, 7 N.E. (2d) 468 (1st Dist., 3d Div., 1937).

¹² Note, 27 Ill. B.J. 201.

¹³ Ill. Rev. Stat. 1939, Ch. 110, § 128.

¹⁴ Hinton, Illinois Civil Practice Act (1934), 282 ff.

¹⁵ Ill. Rev. Stat. 1939, Ch. 110, § 198.

¹⁶ McCaskill, Illinois Civil Practice Act Ann. (1933), 200; Sunderland, "Observations on the Illinois Civil Practice Act," 28 Ill. L. Rev. 861, 873 (1934).

¹⁷ 365 Ill. 389, 6 N.E. (2d) 643 (1937).

¹⁸ *Melsha v. Johns-Manville Sales Corp.*, 299 Ill. App. 157, 19 N.E. (2d) 753 (1st Dist., 1st Div., 1939); noted in 17 CHICAGO-KENT LAW REVIEW 277.

¹⁹ Smith-Hurd Ann. Stats., Ch. 110, § 200(2), and annotations.

²⁰ Mich. Court Rule 56, § 1 (1931); *Hoffman v. Security Trust Co.*, 256 Mich. 383, 239 N.W. 508 (1931); *Puffer v. State Mutual Rodded Fire Ins. Co.*, 257 Mich. 75, 240 N.W. 99 (1932).

²¹ *Wishard v. School Directors of Dist. No. 11*, 279 Ill. App. 333 (4th Dist., 1935); *Veach v. Hendricks*, 278 Ill. App. 376 (4th Dist., 1935); *Hunter v. Hill*, 284 Ill. App. 655, 2 N.E. (2d) 388 (1st Dist., 2d Div., 1936).

²² *Hoffman v. Security Trust Co.*, 256 Mich. 383, 239 N.W. 508 (1931).

case seems to be opposed to the principle stated in the statute that the provisions of the Illinois Civil Practice Act are to be liberally construed for the purpose of doing justice between the parties.²³ The new Federal Rules have received a different construction.²⁴

The Supreme Court, it would seem, should clarify this matter at the earliest possible moment. That the Supreme Court may adopt a more liberal view is foreshadowed by recent decisions.²⁵

DAVID F. MATCHETT, JR.²⁶

²³ Ill. Rev. Stat. 1939, Ch. 110, § 128.

²⁴ *Crump v. Hill*, 104 F. (2d) 36 (C.C.A. 5th, 1939).

²⁵ *National Bank of the Republic of Chicago v. Kaspar American State Bank*, 369 Ill. 34, 15 N.E. (2d) 721, 116 A.L.R. 1464 (1938); noted in 17 CHICAGO-KENT LAW REVIEW 74; *Taylor v. City of Berwyn*, 372 Ill. 124, 132, 22 N.E. (2d) 930 (1939).

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